



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO. 38 OF 2010**

**MOSESE KIMARI..... APPLICANT**

**Versus**

**SHAMMI KANJIRAPPRAMBIL THOMAS.....1<sup>ST</sup> RESPONDENT**

**SPECTAASAVAR (K) LIMITED.....2<sup>ND</sup> RESPONDENT**

**PRIME BANK LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Leave to appeal**

[1] This suit was dismissed by the Court on 31<sup>st</sup> July, 2014 upon the application by the Defendants in that behalf. The Plaintiff has now applied through the application dated 14.8.2014 for leave of the Court to lodged an appeal against the decision of the Court delivered on 31<sup>st</sup> day of July, 2014. The Plaintiff proffers three major reasons for leave. The first one is; it is a requirement of the law that he should seek leave of the Court before he files an appeal. The second; the non-attendance during the delivery of the ruling was out of inadvertence on the part of his counsel. Had counsel attended court, he definitely would have applied for leave immediately on delivery of the ruling herein. I am pleased to note counsel is apologetic for his failure to attend court and I accept it. That is the behaviour of a diligent advocate. Third reason is that the court did not consider his application dated 9<sup>th</sup> day of May, 2013 for leave to amend the plaint despite the fact that this Court had directed that the two applications, the one for dismissal and for leave, shall be heard together. Fourth, the Plaintiff stated that he had filed a Notice of Appeal before expiry of the 14 days allowed in law to file appeal. He has even served the Notice of Appeal on the advocates for the Defendants; they have also filed Notice of Address of Service under rule 79 of the Court of Appeal Rules. The Plaintiff argued that he needed no leave in order to file a Notice of Appeal. The Plaintiff believes he has an arguable appeal with high chances of success. He is convinced he should be granted leave to appeal.

[2] The application is supported by the affidavit of the Plaintiff sworn on 14<sup>th</sup> day of August, 2014.

[3] The Defendants opposed the application for leave on the grounds that it has been overtaken by events and it will be a futile exercise. They said that the Plaintiff had already filed a Notice of Appeal out of time and without leave of the Court.

**DETERMINATION**

[4] Courts have said time and again, that, summary dismissal of suit is a draconian act comparable only to an act of drawing the proverbial ‘‘Sword of the Damocles’’. The Plaintiff is completely driven away from the judgment seat without being heard. And as a court of law, it would be unfair to refuse leave to appeal against such order if indeed it is a requirement of law. In

any event, the explanation given by the Plaintiff is sufficient and reasonable. I will not visit mistake of counsel on the client. That would be most unfair. In the circumstances, I hereby grant leave to the Plaintiff to appeal against my order of dismissal of the suit. Meanwhile, I do not wish to discuss the purport of the decision in the case of **CA at NAIROBI CIVIL APPLICATION NO. 77 OF 2003 (UR.40/03)** or whether a person needs leave before he can file a Notice of Appeal on an order of dismissal of suit. Similarly, I do not wish to discuss whether leave is required on an order of dismissal of suit which, in its very nature, is a final order that completely decimates the suit and the rights of the Plaintiff. Also, the prospects or otherwise of the appeal will be decided in another forum; the Court of Appeal. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 19<sup>th</sup> day of March 2015**

**F. GIKONYO**

**JUDGE**